

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

WEDNESDAY, THE 10TH JANUARY 2007 / 20TH PAUSHA 1928

Crl.MC.No. 1928 of 2006()

CRA.279/2005 of ADDL.SESIONS COURT, PATHANAMTHITTA
CC.240/2001 of JUDL.MAGISTRATE OF FIRST CLASS COURT-II,PATHANAMTHITTA
.....

PETITIONER:

K.JOHN @ ASHOK, MAMUTTIL ESTATE,
OOTTUPARA, ARUVAPPULAM VILLAGE, KOZHENCHERRY
TALUK, PATHANAMTHITTA DISTRICT, NOW RESIDING
AT A5, SREE CHITHRA DOCTORS' QUARTERS,
POOJAPPURA, TRIVANDRUM-12, KERALA STATE.

BY ADV. SRI.K.JOHN @ ASHOK(PARTY IN PERSON

RESPONDENTS: COUNTER PETITIONERS

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1. STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.
 2. SRI.THOMAS NINAN, KARIPPACHERIL HOUSE,
OOTTUPARA P.O., ARUVAPPULAM VILLAGE,
KONNY, PATHANAMTHITTA DISTRICT, KERALA STATE.

BY PUBLIC PROSECUTOR SRI.K.A.AKBAR
SRI.S.RAJEEV
SRI.SANTHOSH MATHEW
SRI.SATHISH NINAN

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD
ON 11/01/2007, ALONG WITH CRMC NO. 1929 OF 2006, THE COURT
ON 10/01/2007 PASSED THE FOLLOWING:

R.BASANT, J

Crl.M.C.Nos.1928 and 1929 of 2006

Dated this the 10th day of January, 2007

ORDER

These Crl.M.Cs are filed by the accused in a prosecution under Sections 323 and 341 I.P.C. He has aggrieved by the common judgment passed by the learned Sessions Judge, Pathanamthita in Criminal Appeal Nos.278 & 279 of 2005. By the said common judgment passed in appeals under Section 341 Cr.P.C, the learned Sessions Judge had set aside an earlier order passed by the learned Magistrate under Section 340 Cr.P.C and had directed the withdrawal of the complaints already filed against the complainant in a prosecution under Sections 323 and 341 I.P.C as also witness/PW2.

2. The parties shall be referred to in this judgment hereinafter as the complainant, PW2 and the accused respectively to avoid any confusion.

3. A synoptic resume of the events which led to the impugned common judgment appears to be necessary for a proper appreciation of the controversy.

4. The alleged incident took place according to the complainant on 04.12.1997. The accused was allegedly guilty of the offences punishable under Sections 323 and 341 I.P.C in that incident.

A private complaint was filed before the learned Magistrate by the complainant on 05.12.97. The learned Magistrate referred the complaint to the police under Section 156(3) Cr.P.C. An F.I.R was registered. Investigation was conducted. But after investigation, the Investigating Officer submitted a negative final report to inform the learned Magistrate that the allegations are unacceptable. The Investigating Officer had also filed a report that action may be taken against the complainant for making a false complaint.

5. The learned Magistrate accepted the refer report (a copy of the refer report is placed before this Court and the same was marked as Ext.D3 in C.C.240 of 2001) and also directed that prosecution be initiated against the complainant for filing a false complaint. S.T.689 of 1998 was registered against the petitioner by the learned Judicial Magistrate of the First Class-II, Pathanamthitta. That S.T was later dismissed for non prosecution.

6. The complainant, aggrieved by the acceptance of the refer report, filed a private complaint on 07.08.1998. Cognizance was taken against the accused and the learned Magistrate proceeded to conduct the trial. PWs 1 & 2 were examined and Exts.P1 and P2 were marked on the side of the complainant. DWs 1 & 2 were examined and Exts.D1 to D42 were marked on the side of the accused. The learned Magistrate by Judgment dated 31.10.2003 (copy of which is produced as Annexure-1) proceeded to acquit the accused. I may

straightaway note that in para.18 of the said judgment, the learned Magistrate had entered the following finding:

“Para.18:In the light of the above discussion, I hold that the complainant has failed to prove his case beyond all reasonable doubts and therefore this point is found against the complainant.”

Against the judgment of acquittal, an appeal was preferred by the complainant and by Annexure-A2 judgment, this Court dismissed the said appeal, ie. Crl.Appeal No.1903 of 2003.

7. Even when C.C.240/01 was pending, the accused had filed two petitions before the learned Magistrate requesting the learned Magistrate to initiate proceedings against the complainant and PW1 for offences allegedly committed by them in having initiated a false prosecution and in having tendered false evidence before the learned Magistrate. Those petitions were disposed of by the learned Magistrate as per two separate orders in C.M.P.8000 of 2003 and C.M.P.8275 of 2003. The learned Magistrate took the view that a complaint is liable to be filed against the complainant and PW2 under Section 340 Cr.P.C. Accordingly, complaints were filed before the learned C.J.M by the Judicial First Class Magistrate – II, Pathanamthitta against the complainant and PW2.

8. The complainant and PW2, aggrieved by those orders passed under Section 340 Cr.P.C, preferred appeals under Section 341 Cr.P.C before the learned Sessions Judge. The learned Sessions

Judge took up both appeals together and by the impugned common judgment allowed both appeals and set aside the order passed under Section 340 Cr.P.C.

9. It is in these circumstances that the petitioner has come to this Court to assail the common judgment passed by the learned Sessions Judge. He had initially preferred revision petitions before this Court, but those revision petitions were dismissed in the light of the mandate of Section 341 (2) Cr.P.C. He has now filed these petitions under Section 482 Cr.P.C to quash the common judgment passed in the two appeals by the learned Sessions Judge.

10. Arguments have been advanced in detail. The petitioner/complainant has appeared in person before me to advance his arguments. The learned counsel for the complainant and PW2 have also been heard. Various contentions have been urged by the rival contestants. I shall advert to them hereafter.

11. The learned counsel for the respondents first of all contends that the powers under Section 482 Cr.P.C do not deserve to be invoked to interfere with an impugned common judgment. The learned counsel for the respondents submits that Section 341(2) Cr.P.C must convey to the court the legislative policy under which finality is attached to an appellate judgment passed under Section 341 Cr.P.C. But for Section 341(2) Cr.P.C, the revisional powers of this Court under Section 401 Cr.P.C would have been available to

interfere with the common judgment. The legislature in its anxiety to ensure that proceedings do not drag unnecessarily and endlessly has incorporated the stipulation that a judgment in an appeal preferred under Section 341 Cr.P.C must be final, submits counsel for respondents – ie. Complainant and PW2. I extract Section 341 Cr.P.C below:

“Section 341 Cr.P.C: Appeal: (1) Any person on whose application any Court other than a High Court has refused to make a complaint under sub-section(1) or sub-section (2) of section 340, or against whom such a complaint has been made by such Court, may appeal to the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 95, and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, making of the complaint which such former Court might have made under section 340, and if it makes such complaint, the provisions of that section shall apply accordingly.

(2) An order under this section and subject to any such order, an order under section 340, shall be final, and shall not be subject to revision.”

(emphasis supplied)

12. I am in agreement with the learned counsel for the petitioner that the stipulations in Section 341(2) must eloquently convey the legislative policy that indefinite prolonging of proceedings under Section 340 Cr.P.C should not be permitted. Conscious of the availability of the revisional jurisdiction of this Court normally, whether invoked suo motu or at the instance of the aggrieved party, the legislature has chosen to rule out such possibility of revisional

interference which an appellate judgment rendered under Section 341 Cr.P.C. Section 341(2) Cr.P.C must certainly convey to this Court that the legislature anxiously and advisedly wanted to ensure that an appellate judgment should not be interfered with invoking the revisional jurisdiction on the normal grounds available of illegality irregularity, impropriety and incorrectness.

13. But that is not to say that the jurisdiction under Section 482 Cr.P.C, which is available to this Court is not available to challenge an appellate judgment under Section 341 Cr.P.C. Restricted and circumscribed the jurisdiction may be, but certainly if the court is satisfied that failure/misconduct of justice results from an appellate judgment rendered under Section 341 Cr.P.C, there can be no fetter on the exercise on the powers under Section 482 Cr.P.C to interfere with even an appellate judgment rendered under Section 341 Cr.P.C.

14. The jurisdictional limitation must certainly be borne in mind. But that does not exclude the jurisdiction of this Court, if the conscience of this Court is satisfied that the failure/misconduct of justice has resulted from the impugned appellate judgment.

15. It will be apposite in this context to straightaway consider the nature of the jurisdiction of courts to initiate action for perjury/filing of false complaint against the complainant/witnesses. It has often been repeated that sanction (for perjury/filing of false

complaint) can only be the medicine of law and not its daily diet. A criminal court does often come across evidence which is not acceptable and complaints on the basis of which conviction cannot be entered against accused persons. In all such cases, a criminal court will not and cannot be persuaded to initiate action under Section 340 Cr.P.C. It is only in a variety of extreme cases where deliberate false implication is attempted and deliberate false evidence is tendered , that the court can come to the conclusion that it is expedient in the interests of justice to direct the prosecution of the complainant/witnesses for the offences committed of perjury/false implication. I cannot attempt to narrate the principle better. I do hence borrow the words of the Supreme Court in **Santokh Singh v. Izhar Hussain** [A.I.R 1973 S.C 2190] in para.11. The Supreme Court observes as follows:

“Para.11:.....
.....
Every incorrect or false statement does not make it incumbent on the court to order prosecution. The court has to exercise judicial discretion in the light of all the relevant circumstances when it determines the question of expediency. The court orders prosecution in the larger interest of the administration of justice and not to gratify feelings of personal revenge or vindictiveness or to serve the ends of a private party. Too frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely, that the court should direct prosecution.....
.....

16. Before ordering prosecution, the court must be satisfied about the twin requirements and they are

(1) that an offence referred to in Section 195(1)(B) has been committed and

(2) that it is expedient in the interests of justice that an enquiry should be made.

In **B.K.Gupta v. Damodar H.Bajaj** [(2001) 9 SCC 742], the Supreme Court observes thus in para.3:

“There are two conditions on fulfilment of which a complaint can be filed against a person who has given a false affidavit or evidence in a proceeding before court. Firstly, that a person has given a false affidavit in a proceedings before the court and, secondly, in the opinion of the court it is expedient in the interest of justice to make an enquiry against such a person in relation to the offence committed by him.”

17. I repeat that it is not in every case where the court is satisfied that the complainant have not spoken the whole truth or that they have exaggerated their version or that their version is not acceptable or that the indictee is entitled to the benefit of doubt that the court can entertain the requisite satisfaction under Section 340 Cr.P.C. The conscience of the court must be satisfied that the interests of public justice is wounded and hurt by the course adopted by the proposed indictee. Then and then alone, the powers under Section 340 Cr.P.C shall be invoked to file a complaint against the complainant/witnesses for perjury/false implication.

18. Precedents have been relied on to contend that the trial court or the appellate court must record a specific finding in the judgment in the case that action is liable to be taken under Section 340 Cr.P.C. I am of opinion that it is not necessary to go into that question in any greater detail in this case. It is trite that the mere omission of a court to record a specific finding or an error committed by the court on that aspect cannot deliver any advantage to anyone or prejudice the interests of anyone. I say so because, before the judgment of acquittal in C.C.240 of 2001 (Annexue-A1) was rendered by the learned Magistrate, the complainant had alertly filed petitions - C.M.P.8000 of 2003 and C.M.P.8275 of 2003 praying that action may be taken under Section 340 Cr.P.C against the complainant and PW2. In spite of such prayers made, the learned Magistrate did not in the judgment of acquittal refer to the said prayer at all and chose to postpone consideration of those petitions to a later date. Even assuming that the learned Magistrate was bound to advert to that aspect in the judgment of acquittal itself, the omission to do so cannot, at any rate, prejudice the cause of the petitioner/accused. With the full knowledge that those petitions were pending, the learned Magistrate chose not to proceed to pass any orders on that aspect, but chose to postpone consideration of the same. In these circumstances, I am satisfied that the mere fact that the learned Magistrate did not make observations in Annexure-1 judgment of

acquittal about the liability of the complainant and PW2 to be proceeded with under Section 340 Cr.P.C, cannot deliver any advantage to the complainant and PW2 nor prejudice the interests of the accused.

19. The crucial question to be considered is whether such false implication/perjury has been resorted to by the complainant and PW2 to justify initiation of proceedings under Section 340 Cr.P.C against them. Even assuming that this aspect was not specifically adverted to by the court in the judgment of acquittal (Annexure-1), it is necessary and essential that the question must be considered by the trial court at the later stages and by the appellate court under Section 341 Cr.P.C and by this Court in these proceedings under Section 482 Cr.P.C.

20. It may not be in-apposite in this context for me to straightaway to refer to the refer report marked as Ext.D3 in C.C.No.240/2001. That document was relied on by the accused himself. The allegations raised against the accused in C.C.240 of 2001 is that at about 4.30 p.m on 4.12.1997 at the Mini Civil Station in Pathanamthitta, the accused had wrongfully restrained and caused simple hurt to the complainant. That is the precise allegation. The Investigating Officer who conducted the investigation and filed Ext.D3 referred charge (and also recommended action against the complainant for filing of a false complaint) had stated in Ext.D3 that

an incident had taken place between the accused and the complainant at about the said place though at a slightly different point of time. Of course, Ext.D3 has been marked by the accused. He contends that he is not bound by all the contents of Ext.D3. He may not be and he is not. But it would be inappropriate for a court considering launching of prosecution under Section 340 Cr.P.C to ignore that relevant input which is available. It is also to be noted that though there is no specific admission, there is no dispute in the trial that the accused was available at the said premises on the relevant date though a precise timing of such availability does not tally with the alleged offence committed.

21. I have been taken through the findings recorded by the learned Magistrate. I have already extracted para.18 of Annexure-I. A careful and detailed consideration of the finding recorded by the learned Magistrate shows that there was no specific finding that the allegations were false or concocted. The finding is only that the complainant had failed to prove his case beyond reasonable doubt. I have also been taken to the separate orders rendered by the learned Magistrate in C.M.P.8000 of 2003 and C.M.P.8275 of 2003. A careful reading of these decisions also convey that a specific, unambiguous and categoric finding that the complainant/PW1 had rendered false evidence is not specifically entered by the learned Magistrate even in those orders passed under Section 340 Cr.P.C.

22. The fact that in conceding the benefit of doubt to the accused, the learned Magistrate had taken note of the incongruity in the alleged date of occurrence – 4.11.97 as 4.12.97 and the plea of alibi raised by the accused do not ipso facto appear to me as sufficient to sail to a safe conclusion that the case is one in which the course under Section 340 Cr.P.C has to be followed.

23. On an anxious evaluation of all the relevant materials, I find it impossible to invoke the extraordinary inherent jurisdiction available to this Court under Section 482 Cr.P.C to interfere with the impugned common judgment rendered by the learned Sessions Judge. The Magistrate who conducted the trial in the judgment of acquittal, the appellate Judge who confirmed the judgment of acquittal or the learned Magistrate (the successor in office of the Magistrate who rendered the judgment of acquittal) in the two orders passed under Section 340 Cr.P.C have not entered a specific finding that the complainant and PW2 are guilty of the culpable indiscretion of tendering absolutely false evidence with the intention of normally implicating the accused. That conclusion/satisfaction is certainly inevitable for a court to direct prosecution for perjury/false implication under Section 340 Cr.P.C. I have been taken through the nature of allegations and evidence which was available before the learned Magistrate in C.C.240 of 2001. I am convinced that no failure/miscarriage of justice is likely to result by the impugned

appellate judgment. The conclusion that such an indiscretion which would warrant invocation of the powers under Section 340 Cr.P.C has not been proved against the complainant and PW2, does appear to me to be absolutely cogent and reasonable. At any rate, there is no warrant for invocation of the powers under Section 482 Cr.P.C.

24. In the result, these Crl.M.Cs are, dismissed. I place on record my appreciation for the thorough dignified and able assistance rendered to this Court by the appellant who appeared in person and argued his case.

(R.BASANT, JUDGE)

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